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MICHAEL RODAK, JR.

in the Supreme Court of the United States

OCTOBER TERM, 1973

CASE NO. 73-176

ARTHREE, INC., et al.,

Petitioners,

vs.

HOWARD KASKEL, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT.

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INTRODUCTION

The Petitioners,[1] owners and operators of the Carriage House Apartment Hotel and Yacht Club, seek review of an opinion of the District Court of Appeal of Florida, Third District, recorded in **Arthree, Inc. vs. City of Miami Beach,** 269 So.2d 699 (3rd D.C.A., Fla. 1972). The Petitioners' were the Plaintiffs in the Circuit Court of the 11th Judicial Circuit in and for Dade County, Florida; the Appellees in the District Court of Appeal of Florida, Third District; and the Petitioners in the Supreme Court of Florida. The Respondents,[2] which include the City of Miami Beach and the owners of the Fontainebleau Hotel and the Doral Beach Hotel, were the Defendants-Intervenors in the Circuit Court; the Appellants in the District Court of Appeal of Florida, Third District; and the Respondents in the Supreme Court of Florida.

The symbol "AP" will be utilized to designate the Appendix of the Petitioners and the symbol "AR" will be utilized to designate the Appendix of the Respondents incorporated in this brief.

JURISDICTION

The Petitioners contended before the trial court and the District Court of Appeal, Third District, of Florida that the CARRIAGE HOUSE APARTMENT HOTEL AND YACHT CLUB was a hotel within the meaning of

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[1]The Petitioners include Robert Blum, Robert Rautbord, and Robert L. Turchin, d/b/a The Carriage House Apartment Hotel and Yacht Club.

[2]The Respondents are Howard Kaskel, Doris Kaskel, Carole Schragis and Anita Blum, as the ancillary co-executors of the Estate of Alfred I. Kaskel, deceased, d/b/a Doral Beach Hotel, and the Fontainebleau Hotel Corp., a Florida corporation.

the Zoning Ordinance of the City of Miami Beach, (Ordinance No. 289, AR 5-13), and therefore that it was entitled to the accessory uses[1] allowed and permitted by the Ordinance to hotels of 100 or more guest rooms, but denied to apartment houses or hotels with less than 100 guest rooms. The District Court of Appeal, Third District, of Florida held that the Carriage House was not a hotel consisting of 100 or more guest rooms and therefore it was not entitled to the accessory uses restricted to hotels with 100 or more guest rooms, and further, that the classification between hotels of 100 or more guest rooms and apartment houses and apartment hotels with regard to accessory uses constituted a reasonable classification.

It is, therefore, respectfully submitted that the decision of the Federal question concerning equal protection under the 14th Amendment to the United States Constitution was not necessary to the determination of the cause by the District Court of Appeal, Third District of Florida.

The Florida appellate court held:

> "Although the proceedings have been lengthy and complicated, there is actually only one issue in dispute between the parties, and that issue is whether appellees' apartment hotel is required by law to be treated as a hotel for the purposes of determining whether it may operate service stores, offices, and other accessory uses which oceanfront hotels are permitted to operate in the City of Miami Beach.
>
> • • •

[1]The accessory uses permitted by the Ordinance and desired by the Petitioners consisted of a sundry shop, beauty shop, antique shop, women's dress shop, children's wear shop, men's shop, stockbroker's office and a barber shop.

A study of the arguments of the contending parties reveals a fundamental difference in their approach to the problem. The appellants urge that in determining whether a building is a hotel, an apartment house, or an apartment hotel, the court should be governed by the structure of the building itself. On the other hand, the appellees urge that the determination should be made upon the basis of the valid use being made of the building at the time of the application for accessory uses.

* * *

In light of the definitions contained in Ordinance No. 289 and in Fla. Stat. § 509.242(1)(a)(b), F.S.A. and in view of the fact that the applicability of zoning provisions must have some permanence, we think that the determination of whether a given building is an apartment hotel or a hotel must be made upon the basis of the structure rather than upon changes in the building's use." (AP 14, 17, 20)

Accordingly, this Court lacks jurisdiction of this cause. See: **Lynch v. People of New York, ex rel. Pierson**, 293 U.S. 52, 55 S.Ct. 16; **McGoldrick v. Gulf Oil Corp.** 309 U.S. 2, 60 S.Ct. 375; and **Public Service Commission v. Wisconsin Telephone Company**, 309 U.S. 657, 60 S.Ct. 514.

The Supreme Court of the United States held in **Lynch v. People of New York, ex rel. Pierson**, 293 U.S. 52, 55 S.Ct. 16, at page 17:

[2-4] It is essential to the jurisdiction of this Court in reviewing a decision of a court of a

state that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. De Saussure v. Gaillard, 127 U.S. 216, 234, 8 S.Ct. 1053, 32 L.Ed. 125; Johnson v. Risk, 137 U.S. 300, 306, 307, 11 S.Ct. 111, 34 L.Ed. 683; Walter A. Wood Mowing & Reaping Machine Co. v. Skinner, 139 U.S. 293, 295, 297, 11 S.Ct. 528, 35 L.Ed. 193; Eustis v. Bolles, 150 U.S. 361, 366, 367, 14 S.Ct. 131, 37 L.Ed. 1111; Whitney v. California, 274 U.S. 357, 360, 361, 47 S.Ct. 641, 71 L.Ed. 1095; Mellon v. O'Neil, 275 U.S. 212, 214, 48 S.Ct. 62, 72 L.Ed. 245. Where the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon

*55

which of *two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction. Allen v. Arguimbau, 198 U.S. 149, 154, 155, 25 S.Ct. 622, 49 L.Ed. 990; Johnson v. Risk, supra; Walter A. Wood Mowing & Reaping Machine Co. v. Skinner, supra; Consolidated Turnpike Co. v. Norfolk & Ocean View Railway Co., 228 U.S. 596, 599, 33 S.Ct. 605, 57 L.Ed. 982; Cuyahoga Power Co. v. Northern Realty Co., 244 U.S. 300, 302, 304, 37 S.Ct. 643, 61 L.Ed. 1153.

STATEMENT OF THE CASE AND FACTS

On the 5th day of June, 1967, the petitioner, Arthree, Inc. applied for and procured a building permit from the City of Miami Beach. The application of the Petitioners for a building permit described the building to be constructed as follows:

"Description of work to be done:

Temp. permit for apt bldg., 14 sty, 380 units 813,696 sq ft" (AR 1)

On December 21, 1967, the City of Miami Beach issued to Arthree, Inc., its permanent building permit in which the description of the work to be performed is as follows:

"14 Story Apt. Bldg. 390 Units 585 Parking

2-BR - 74 — 141 Bath	Duplex - 26-52 Bath
1-BR & D 54-108 Bath	3 BR - 2 Total 707 Bath
1-BR - 110-250 Bath	Rooms
EFF - 122-135 Bath"	4-BR - 2 21
(AR 3)	

Said building permit further provides:

"... I hereby agree to do the proposed construction in strict conformity with the application and plans and specifications thereof heretofore by me submitted..."

Said apartment building maintains an inner lobby through which all tenants must pass to gain access to the apartments. It is, therefore, an apartment hotel under the definition thereof contained in the Zoning Ordinance:

> "APARTMENT HOTEL: An apartment building, under resident supervision, which maintains an inner lobby through which all tenants must pass to gain access to the apartments and which may furnish dining room service for tenants only." (AR 7)

Certain definitions contained in the Zoning Ordinance are important:

> "DWELLING, TWO-FAMILY: A detached building, divided horizontally or vertically and designed for or occupied by two single-family housekeeping units; contained entirely under one roof and having one dividing partition common to each unit or having the ceiling structure of the lower unit the floor structure of the unit above.
>
> DWELLING, ONE-FAMILY: One or more persons, occupying premises and living as a single housekeeping unit, as distinguished from a group occupying a boarding house, a lodging house or hotel, as herein defined."

Under Section 4-D of the Zoning Ordinance which is applicable to the property involved, it is provided that

the owner of such property may construct "Multiple Family Dwelling or apartments in accord with the area provisions hereinafter defined, and accessory buildings" and may also construct hotels. If a hotel is constructed consisting of more than 100 guest rooms certain service facilities are permitted. A copy of said provision is found at (AR 10-13)

This apartment hotel was named the Carriage House and is situated at 5401 Collins Avenue, Miami Beach, Florida. When completed, the Carriage House had 30 hotel rooms, 117 studio apartments with kitchen facilities, 150 one-bedroom apartments with kitchen facilities, 65 one-bedroom apartments with dens and kitchen facilities, 44 two-bedroom apartments, some with dens, with kitchen facilities, and 5 three-bedroom penthouse apartments with kitchen facilities. Of these, the owners designated as transient accommodations the following: 30 hotel rooms for single or double occupancy; 46 one bedrooms with kitchens (studio apartments); 16 one-bedroom suites with kitchens; 9 two-bedroom suites with kitchens. (Answer to Interrogatories, AR 14) This, they contended gave them a total of 101 hotel units which they also contended qualified them for all the accessory uses permitted in hotels consisting of 100 or more guest rooms as provided by Section 4D of the zoning ordinance. The District Court of Appeal, Third District of Florida held they did not have 100 or more hotel units. (AP 11-22)

REASONS FOR NOT GRANTING WRIT

The United States Supreme Court in the landmark zoning case of **Village of Euclid, Ohio, v. Ambler Realty Co.**, 272 U.S. 365, 47 S.Ct. 114, held that a zoning ordi-

nance must be clearly arbitrary and unreasonable with no substantial relation to public health, safety, morals or general welfare before it can be declared unconstitutional. In the instant case the Petitioners, owners and operators of the Carriage House, contend that they are being discriminated against because there are other properties in the neighborhood with accessory uses which the Carriage House seeks to utilize.

It is respectfully submitted that this argument fails because the neighboring properties permitted to have accessory uses consist of hotels of 100 or more guest rooms. Since the District Court of Appeal, Third District of Florida found, as a matter of law, that the Carriage House is not a hotel of 100 or more guest rooms it is not in the same class as those properties permitted to have certain accessory uses.

A classification based upon hotels as distinguished from apartment hotels is not arbitrary and bears a reasonable relationship to accessory uses. An "apartment hotel" is constructed so as to accommodate permanent resisdents. A "hotel" is constructed so as to accommodate transient guests and therefore requires service facilities and accessory uses to provide its guests the comforts and necessities required by temporary residents away from their permanent residence.

The Court will take judicial notice that there are many common and well-known differences between an apartment house and a hotel. A hotel furnishes and pays for— an apartment does not — electricity, water, room service, maid service, telephone service, porter service, and generally hires living quarters by the day. Due to

greater services required by a hotel, it is obvious that it must have at least two or three times the number of employees required to supervise an apartment hotel. A tenant in an apartment house pays his own electricity, water, phone, expenses of housekeeping and house cleaning, the apartment has space for the storage of food and drinks. Tenants do most of their own cooking and employ their own maids and cooks. Generally they hire their living quarters by the year.

Consequently, due to these differences, the Zoning Ordinance of the City of Miami Beach treats apartment houses as residences for families and hotels as temporary abodes for transients.

The Zoning Ordinance applies to an apartment house a different standard of use than it applies to hotels. In recognition of the needs of a hotel in supplying the services required for the comfort of its patrons, the District Court of Appeal of Florida, Third District, acknowledged the right and power of the City of Miami Beach to apply a different standard of permitted uses to a hotel than those applied to an apartment house. It recognized the distinction between the classes which is obvious to all, and held that the Zoning Ordinance is not unconstitutional as discriminatory or as lacking a logical relationship to the public welfare of the City of Miami Beach. The Court said:

> "... We have previously considered that question and held that there is a reasonable relationship between the public welfare and an ordinance which prohibits service stores in apartment houses."

It is further submitted that the City of Miami Beach is a tourist oriented economy which depends to a large extent on the health of its hotel industry. Even if Section 4D of the Zoning Ordinance of the City of Miami Beach is viewed as giving an economic advantage to hotels, certainly as aforesaid, the classification has a reasonable basis. As the Supreme Court of the United States held in the case of **Dandridge v. Williams**, 397 U.S. 471, 90 S.Ct. 1153, at page 1161:

> [13-15] In the area of economics and social welfare, a State does not violate the Equal Protection Clause merly because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78, 31 S.Ct. 337, 340, 55 L.Ed. 369. "The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific." Metropolis Theatre Co. v. City of Chicago, 228 U.S. 61, 69-70, 33 S.Ct. 441, 443, 57 L.Ed. 730. "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." McGowan v. Maryland, 366 U.S. 420, 426, 81 S.Ct. 1101, 1105, 6 L.Ed.2d 393.

CONCLUSION

It is respectfully submitted that the decision of the alleged Federal question was not necessary to the determination of the cause by the District Court of Appeal, Third District of Florida, and therefore this Court lacks jurisdiction of this cause.

Furthermore, the classification based upon hotels as distinguished from apartment hotels is not arbitrary and bears a reasonable relationship to the need for accessory uses.

WHEREFORE, Respondents pray that this Court decline jurisdiction of this cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing "Brief in Opposition to Petition for Writ of Certiorari to the District Court of Appeal of Florida, Third District" was mailed to the following:

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on this ____ day of _____, 1973.

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